

# **WILLIAMSBURG BOARD OF ZONING APPEALS MINUTES**

August 5, 2003

The regular meeting of the Williamsburg Board of Zoning Appeals was held on Tuesday, August 5 at 3:00 p.m. in the Williamsburg Municipal Building, 401 Lafayette Street.

## **ATTENDANCE**

Present were Board members Carr, Kafes, Chohany, and White. Absent was Board member Knudson. Also present were Zoning Administrator Murphy, City Attorney Phillips, and Secretary Scott.

## **CALL TO ORDER AND MINUTES**

Chairman Carr called the meeting to order.

Mr. Kafes moved that the minutes of the July 1, 2003 meeting be approved as submitted. The motion was seconded by Mr. Chohany and carried by roll call vote of 3-0. Ms. White abstained from the vote because she had abstained from discussion and voting at the meeting on July 1.

## **PUBLIC HEARINGS**

**BZA #03-12: Request of George Thorpe and Marjorie McLanahan to appeal the decision of the Zoning Administrator contained in a letter dated June 6, 2003 that parcel 3 was recorded as a separate lot and not a private street. The property is located at 119 Matoaka Court, Williamsburg Tax Map Number 434-(03)-0B-001B, 2\* and is zoned Single Family Dwelling District RS-2. The Zoning Administrator's decision was upheld by a vote of 3-1.**

Chairman Carr introduced the request and invited the applicant to comment.

The applicant's representative, Attorney Sheldon Franck, asked the Board to refer to the plat in question, and gave a brief history of the parcels. He stated that the case is really an interpretation of Zoning Ordinance Sections 21-608 and 21-2. In the "Definition" section of the Zoning Ordinance, Section 21-2, "Street" is defined as a public or private thoroughfare which affords the principal means of access to abutting property. Mr. Franck submitted that although the Zoning Ordinance does not define "thoroughfare," parcel 3 provides sole access between parcel 2 and Matoaka Court, and is a private street within the meaning of Section 21-608.

In the absence of a definition of "thoroughfare" in the Zoning Ordinance, Mr. Franck turned to the Webster's Dictionary definition of "thoroughfare" as "(1) a way or passage through (2) a public street open at both ends, esp. one through which there is much traffic; highway; main road."

Ms. White asked Mr. Franck if it was his position that the deed satisfied the requirement of Section 21-608 regarding "recordation in the clerk's office...", and Mr. Franck indicated that was his position. Ms. White asked Mr. Franck if the determination of whether a particular area is a street is a factual issue to be determined based on the facts of a particular case, and Mr. Franck indicated he believed that to be true.

Ms. White then referred to the minutes of the April 1, 2003 meeting, page 3, and pointed out that the applicant referred to the parcel in question at the April meeting as a "parcel" and a "lot" and never once referred to the subject parcel as a street or made any reference to the parcel as anything but a lot.

Ms. White also referred to the Hickam deed in which the subject parcel was referred to as "all that certain lot or parcel of unimproved land lying on the southerly side of Powhatan Avenue" and noted that she could not find any reference in the deeds provided by Mr. Franck to the parcel as being a "street." Mr. Franck stated that the parcel was not referred to as a street in any recorded document to his knowledge.

Ms. White stated that the Board had taken a view of the parcel in question and it was evident from the large old trees and mature vegetation that the subject parcel had not been used as a street or any type of thoroughfare in the past.

Chairman Carr opened the public hearing.

**Aleck Loker**, 212 Brooks Street, stated that he and his wife, Ann, have written a letter to the Board encouraging them to sustain the decision of the Zoning Administrator with regard to parcel 3, lot 1 of 119 Matoaka Court. Mr. Loker briefly reviewed reasons for supporting the Zoning Administrator's classification of parcel 3. He also noted that there was no evidence whatsoever of past usage of the parcel as a thoroughfare. He stated that at best if the variance were granted, the subject parcel would serve as a future "driveway" for the newly combined parcels.

**Mary Le Gouellec**, 117 Matoaka Court, stated that regardless of any attempts to prove otherwise, parcel 3 is not meant to be a thoroughfare and she supports the Zoning Administrator's decision. She noted that the current owners inherited the property, receive a substantial income from it as rental property, and parcel 2 is not a buildable lot. She stated that parcels 2 and 3 have value in that they add

value and square footage when combined with the existing Lot 2. Mrs. Le Gouellec asked Mr. Thorpe if he would approve a comparable application in his own township, Chadds Ford, PA. where he is a supervisor. She concluded by saying this property has been a windfall for him, but if developed as he proposes, will lower property values for the neighbors.

Chairman Carr reminded the audience of the narrow scope of the Board's review today which is to determine whether the Zoning Administrator's decision should be upheld.

**Cathie Allport**, 115 Matoaka Court, stated that she and her husband have lived here since 1979 and have environmental concerns. She noted that the entire building area on parcel 2 would be in the RPA buffer, the runoff from the parcel would affect the lake, and that construction would represent a detriment to adjacent property owners.

There being no other comment, the public hearing was closed.

Chairman Carr asked for the Board's comments or questions.

Mr. Kafes said the Board was faced with a very narrow question, i.e. whether or not lot 3 is a private street. He added that his analysis was very much the same as Mr. Franck's and depended on the definition of a private street as a "thoroughfare" to provide access to a given lot or lots. In this regard he first noted that the parcel was created to afford access to lot 2, and served no other conceivable purpose as it clearly was not buildable by itself. Mr. Kafes then summarized definitions of "thoroughfare" from several dictionaries: The New Oxford Shorter English Dictionary, 1993; the Encarta World English Dictionary, 1<sup>st</sup> Edition, 1999; Black's Law Dictionary, 4<sup>th</sup> Edition; and Merriam Webster's, 9<sup>th</sup> New College Dictionary, copyright 1983. All of the definitions in question gave "thoroughfare" a broad definition as providing a passage or way from one place to another. He concluded that Lot 3 provided a thoroughfare to Lot 2 and thus is a "private street." He then moved that the Board determine that the decision of the Zoning Administrator, that parcel 3 was recorded as a separate lot and not a private street, was in error.

The motion died due to lack of a second.

Ms. White moved that the Board determine that the decision of the Zoning Administrator, that parcel 3 was recorded as a separate lot and not a private street, is correct. The motion was seconded by Mr. Chohany who added that the property is not consistent with the layout of the rest of the neighborhood and he also would have issues if he lived there. He added that the parcel would be very challenging to build on, and the wording in the deed does not mention "street."

Ms. White said that Mr. Kafes and Mr. Franck have made the best arguments possible for the applicant, but their arguments are not, in her opinion, dispositive of the issue. She stated that whether a particular parcel constitutes a "street" under Section 21-608 is a question of fact to be determined based on the facts of each situation. She added that as a real estate attorney she is very familiar with the concept of "paper streets", as referred to by Mr. Franck, but that parcel 3 was never platted as a street, it was not deeded or conveyed as a street, and there is no evidence whatsoever that the parcel was ever used as a street/thoroughfare.

Mr. Carr agreed with Ms. White's comments.

Mr. Kafes said again that "thoroughfare" has a broad meaning not necessarily limited to vehicular traffic nor is there any apparent notion that a "thoroughfare" necessarily be improved as a graded or paved passage, the only requirement being that of providing access.

Mr. Chohany noted there is nothing in the deed about "thoroughfare," and a thoroughfare was not the intended use.

Mr. Kafes asked City Attorney Phillips if the recordation of a deed requires the notation of an intended private street usage. Mr. Phillips responded that it needs to be noted only upon recordation of a plat where the street is not to be dedicated. He added that there is no plat of this parcel and nothing showing it as a passageway. The dictionary defines passageway as being open at both ends and since this is not open at both ends, it is not a passageway. If anything it is a driveway.

The question was called. The motion to uphold the Zoning Administrator's decision that Parcel 3 was recorded as a separate lot and not a private street, carried by roll call vote of 3-1.

Recorded vote on the motion:

Aye: Chohany, Carr, White  
No: Kafes  
Abstain: None  
Absent: Knudson

**BZA #03-13: Request of Ross and Sylvia Payne for a variance from Section 21-142 of the Zoning Ordinance to remove an existing addition on the rear that is located 12.98 feet from the side yard for construction of an new addition that will be located 10 feet from the side yard instead of 15 feet as required by the Zoning Ordinance. The property is located at 102 John Tyler Lane, Williamsburg Tax Map**

**Number 552-(05)-00-006 and is zoned Single Family Dwelling District RS-1. Approved.**

Chairman Carr introduced the request for a variance and invited the applicant to comment.

Owner/applicant Ross Payne referred to Zoning Administrator Murphy's memorandum in which it is noted that the Paynes recently purchased the property based upon a survey conducted in 1978 which reflects the existing and proposed additions meeting the 15 foot side-yard setback. However, a recent survey indicates the existing addition encroaches into the side-yard setback with the proposed addition being located ten feet from the side property line. Mr. Payne said they want the house to be more functional, especially as they grow older.

Mr. Kafes stated that the intrusion into the setback is minimal being only a small corner of the proposed addition.

Ms. White asked whether there exists sufficient hardship to allow the addition to encroach into the required side yard setback. Mr. Payne responded that as they get older they're going to want to avoid the stairs to the basement where the washer and dryer currently are installed. They'd like to move the appliances upstairs. Mrs. Payne added that when they purchased the house they did so in good faith, but under the recent survey, even the existing sunroom is in violation.

Zoning Administrator Murphy noted that she has received a letter from adjacent property owner, Pamela Reiss, in full support of the variance.

Chairman Carr opened the public hearing.

There being no comment the public hearing was closed.

Board comments included:

- The lot is oddly shaped
- The variance is minimal
- Expansion is reasonable
- Adjoining properties are well screened

Mr. Kafes moved that the five foot side yard variance be approved based on Zoning Ordinance Section 21-97(b)1 which states that "When a property owner can show that his property was acquired in good faith and where by reason of exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the chapter, or where, by reason of exceptional topographic conditions or other extraordinary situation or condition of such piece of property immediately adjacent thereto, the strict application of the

terms of the applicable provisions of this chapter would effectively prohibit or unreasonably restrict the utilization of the property, or where the board is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of this chapter."

Ms. White seconded the motion noting fulfillment of Section 21-97(b)2. which states that. "No such variance shall be authorized by the board unless it finds:

- a. That the strict application of this chapter would produce undue hardship.
- b. That such hardship is not shared generally by other properties in the same zoning district and the same vicinity.
- c. That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance."

The motion carried by roll call vote of 4-0.

Recorded vote on the motion:

Aye: Chohany, Carr, White, Kafes  
No: None  
Abstain: None  
Absent: Knudson

**BZA #03-14: Request of Westgate Resorts, Inc. for a special exception from Section 21-754 of the Zoning Ordinance to allow one additional free-standing sign for the business. The property is located at 1324 Richmond Road, Williamsburg Tax Map Number 403-0A-00-008 and is zoned General Business District B-3. Approved.**

Chairman Carr introduced the request for a special exception and invited the applicant to comment.

Thomas Tingle with Guernsey & Tingle Architects, representing Westgate Resorts, showed locations of current signage at the site. The pictures showed significant foliage that had been preserved when Richmond Road was widened. Mr. Tingle assured members of the Board that the signage would meet all code requirements, and provided reasons for justification for the special exception.

Mrs. Murphy confirmed that the request involves two separate businesses on one parcel.

Chairman Carr opened the public hearing.

There being no comment the public hearing was closed.

Ms. White stated that she is in support of the request. It will be a major improvement to the City of Williamsburg and presents a unique situation. Ms. White moved that the request be approved based on Zoning Ordinance Section 21-754 which states that

- (a) "Whenever the location, topography or configuration of any lot on which any permitted use is conducted is such as will cause a hardship by the limitation placed on the signs permitted by this article due to sight distances, existing vegetation, location of buildings on adjacent lots, insufficient area to locate a monument sign or a freestanding sign supported by a pole or post at each end of the sign, and/or the topography of the parcel, the Board of each Zoning Appeals may grant a special exception, in accordance with section 21-97(f), to either allow one additional freestanding sign, or to increase the amount of building mounted sign area by not more than 25 percent.
- (b) No additional signage shall be approved by the Board of Zoning Appeals unless it is found:
  - 1. That the strict application of this section would cause an undue hardship.
  - 2. That such hardship is not shared generally by other properties in the same vicinity.
  - 3. That the issuance of the permit will not be of substantial detriment to adjacent property and that the character of the area will not be changed by the granting of the permit for additional signage.
- (c) Any additional signage approved shall be limited to the applicant only, and shall not apply to any future tenant or business.
- (d) Any freestanding sign approved in lieu of a required monument sign or freestanding sign supported by a pole or post on end of the sign shall be limited in height to 10 feet."

Mr. Chohany seconded the motion which carried by roll call vote of 4-0.

Recorded vote on the motion:

Aye: Chohany, Carr, White, Kafes  
No: None  
Abstain: None  
Absent: Knudson

**BZA #03-15: Request of George Tsoucalas for a special exception in accordance with Section 21-826 of the Zoning Ordinance to reduce the Resource Protection Area buffer and a variance from Section 21-481 of the Zoning Ordinance. The property is located at 8 Wildwood Lane, Williamsburg Tax Map Number**

**555-(04)-00-064, in the Port Anne Subdivision, zoned Planned Unit Development. A new single family dwelling is proposed and the applicant proposes two options for the location of the dwelling on the lot. Option A requires a special exception to locate the dwelling approximately four feet from wetlands requiring a waiver of 96 feet of the Resource Protection Area buffer. Option B requires a special exception to locate the dwelling approximately seven feet from wetlands requiring a waiver of the 93 feet of Resource Protection Area buffer and a variance of 2.88 feet to locate a bay window into the ten foot side yard setback. The applicant has also requested an option to locate a timber retaining wall that encroaches five feet into the wetlands for both Option A and B. Approved Option B.**

Ms. White stated that she will abstain from discussion and voting on this request due to a conflict of interest.

Chairman Carr introduced the request for a special exception and invited the applicant to comment.

Attorney Steve Harris, representing the applicant George Tsoucalas, briefly gave a chronological review of the case and noted that Mr. Tsoucalas is presenting a modified request with Option A & B.

Mr. Carr stated that he voted against approval of Mr. Tsoucalas' proposal at the last meeting of the Board of Zoning Appeals. He asked what the difference is between that proposal and the one presented today, and was informed that Option A is 4.5 feet from the wetlands and Option B is 7.5 feet forward from the wetlands, the width is smaller, driveway changed to cement block with trenches to drain water, and a bay window is proposed. Either option will have gas heat. When asked for his preference, Mr. Tsoucalas answered that he would prefer approval of Option B.

Chairman Carr opened the public hearing.

**Phillip Young**, 26 The Palisades, said that in 1991 he benefited by being granted approval to intrude into the second 50 feet of the RPA, but if he were on this committee, he would grant encroachment into the first 50 feet, but carefully study the need to go into the second 50 feet.

Mrs. Murphy clarified that the encroachment into the first 50 feet of the RPA is approval she, as Zoning Administrator, can grant. It is the second 50 feet that require a public hearing by the BZA.

Mr. Carr noted that there is no tidal water at this site.



Mr. Chohany moved that the special exception for Option B, with the retaining wall, be granted based on fulfillment of Sections 21-481 and 21-826 of the Zoning Ordinance which states that the Board shall review the request for a special exception and the required water quality impact assessment and may grant a special exception with such conditions and safeguards as deemed necessary to further the purpose and intent of this article if it finds:

1. Granting the special exception will not confer upon the applicant any special privileges that are denied by this article to other property owners;
2. The request is not based upon conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or nonconforming that are related to adjacent parcels;
3. The special exception request is the minimum necessary to afford relief;
4. The special exception request will be consistent with the purpose and intent of this article, and not injurious to the neighborhood or otherwise detrimental to the public health, safety and welfare, and
5. Reasonable and appropriate conditions are imposed which will prevent the special exception request from causing a degradation of water quality.

Mr. Chohany attached the following contingencies to his motion:

1. The dimensions and design calculations for the infiltration trench and drywells must be submitted and approved by the City prior to obtaining any land disturbing or building permits for property.
2. A BMP maintenance agreement must be submitted, approved and recorded for the infiltration trench and dry wells before any land disturbing or building permits can be issued for the property.
3. A certification letter acceptable to the City that the infiltration trench and dry wells were installed as approved by the City before a certificate of occupancy can be issued for the dwelling.
4. A landscape plan must be submitted and approved by the Zoning Administrator with all plant material being installed prior to the issuance of a Certificate of Occupancy for the dwelling to mitigate the nonpoint source pollution.

Mr. Chohany also asked that Plat Option B be made part of the record.

Mr. Kafes seconded the motion noting that in addition to the above-noted Zoning Ordinance Sections, his approval is based on the fact that this is a residential use, not agricultural, it is heavily wooded, vegetated, has City of Williamsburg sewers, no storage tanks, and the impact on the RPA is not measurable. The motion carried by roll call vote of 3-0-1.

Mr. Carr stated he has a higher level of comfort with the clarification of his issues. He said he appreciates the steps taken by the applicant to clarify the request,

including the report submitted by Stokes Environmental Associates, Ltd., "Major Water Quality Impact Assessment for Encroachment into the RPA", the legal representation, and the option presented to pull back 7.5 feet from the wetlands.

Recorded vote on the motion:

Aye: Chohany, Carr, Kafes  
No: None  
Abstain: White  
Absent: Knudson

**OLD BUSINESS – None**

### **CLOSED SESSION**

Ms. White moved that the Board of Zoning Appeals go into Closed Session pursuant to Section 2.2-3711 of the Code of Virginia for the purpose of discussing one legal matter per subparagraph 7 for the purpose of consultation regarding pending litigation requiring the provision of legal advice by counsel. Mr. Chohany seconded the motion.

Recorded vote on the motion:

Aye: Chohany, Carr, Kafes, White  
No: None  
Abstain: None  
Absent: Knudson

The meeting adjourned at 4:40 p.m.

At 4:50 p.m. the Board met in Open Session.

Mr. Kafes moved the Certification of Closed Meeting. The motion was seconded by Ms. White.

Recorded vote on the motion:

Aye: Chohany, Carr, Kafes, White  
No: None  
Abstain: None  
Absent: Knudson

### **CERTIFICATION OF CLOSED MEETING**

Date: August 5, 2003

WHEREAS, the Board of Zoning Appeals of the City of Williamsburg has convened a closed meeting on this date pursuant to an affirmative

recorded vote and in accordance with the provisions of The Virginia Freedom of Information Act; and

WHEREAS, Section 2.2-3712 of the Code of Virginia requires a certification by the Board of Zoning Appeals that such meeting was conducted in conformity with Virginia Law.

NOW, THEREFORE, BE IT RESOLVED that the Board of Zoning Appeals hereby certifies that, to the best of each member's knowledge, (i) only public business matters lawfully exempted from open meeting requirements by Virginia law were discussed in the closed meeting to which this certification resolution applies, and (ii) only such public business matters as were identified in the motion convening the closed session were heard, discussed or considered by the City of Williamsburg.

VOTE:

Aye: Chohany, Carr, Kafes, White  
No: None  
Absent: Knudson

Absent During Vote: Knudson  
Absent During Meeting: Knudson

## **NEW BUSINESS**

### Amendment to Bylaws

Mr. Kafes asked the Board to consider amending the Bylaws to add, under Article V. Applications or Appeals to the Board, number 3, that no application will propose "options" for the Board to review.

Ms. White noted that the Board sometimes will ask if the applicant will consider an alternative regarding their proposal. Mr. Kafes responded that his intent is to avoid potential confusion regarding the actual proposal. Although two *components* of a proposal are acceptable, two or more *options* are not. He would like Board members to consider his suggestion and vote on it at a future date.

There being no further business the meeting adjourned at 5:05.

Respectfully submitted,

William H. Carr, Chairman  
Board of Zoning Appeals